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Supreme Court, U.S.
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No. 97-520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

IT CORPORATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a benefit plan administrator has the ability to waste the assets of an employee benefit plan by making the final decision to grant benefits without any review, by directing payment of funds from the plan's bank account, and such decision is expressly binding on the plan, may a district court conclude, without more, that the administrator is excused as a matter of law from compliance with the obligations of a fiduciary under ERISA?

2. When an insurance company agrees to provide administrative services to an employee benefit plan under ERISA, may it simultaneously claim immunity from suit for breach of its obligations under state law (on the ground that ERISA preempts all state law obligations of persons who contract with ERISA plans) and that ERISA bars any action against it (because it is not a fiduciary)?

PARTIES TO THE PROCEEDING
and Rule 29.6 Statement

The Respondents in this case are IT Corporation, IT Corporation Benefit Plan, and Harry Joseph Lukowski.

IT Corporation is 100% owned by International Technology Corporation, a Delaware Corporation which is publicly traded on the New York Stock Exchange. IT Corporation itself, a California corporation, owns no subsidiary corporations or entities which have issued shares to the public, and has itself issued no shares to public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED . . 1

STATEMENT OF THE CASE AND FACTUAL BACKGROUND 1

REASONS WHY THE WRIT SHOULD BE DENIED 4

A. The Decision Below Is an Unexceptional Application of Accepted Legal Principles to a Novel Fact Situation; It Neither Conflicts With the Holding of Any Other Circuit, Nor Presents an Unusually Important Question of Federal Law 4

B. There Is No Conflict on the Basis of Discretionary Authority 5

C. The "Bright Line" Test Offered by General American Is a Murky Morass 15

Page

D. The Distinction Between "Control/ Authority" And "Handling" Is of No Aid to General American 16

E. The Impact of Immunity For Those Paid as Expert Administrators Defies The Concept of "Expert" And of The Premise of ERISA. 19

CONCLUSION. 21

APPENDIX A

Portions of the Administrative Services Agreement between the Plan and General American. A1

TABLE OF AUTHORITIES

Page

Cases

Baker v. Big Star Div. of the Grand Union Co.,
893 F.2d 288 (4th Cir. 1990). 10, 13

Baxter v. C.A. Muer Corp.,
941 F.2d 451 (6th Cir. 1991). 12

Blatt v. Marshall and Lassman,
812 F.2d 810 (2nd Cir. 1987) 11, 18

Broemenn Healthcare v. Northwestern Nat'l. Life Ins. Co.,
806 F.Supp 799 (C.D. Ill. 1992) 12

Chapman v. Klemick,
3 F.3d 1508 (11th Cir. 1993). 13

Confer v. Custom Engineering Co.,
952 F.2d 34 (3rd Cir. 1991) 8

Custer v. Sweeney,
89 F.3d 1156 (4th Cir. 1996). 7

Eaton v. Aetna Cas. & Surety Co.,
581 F.Supp 743 (D.D.C. 1980). 14

Geller v. County Line Auto Sales, Inc.,
86 F.2d 18 (2nd Cir. 1996). 11

Gibson v. The Prudential Ins. Co.,
915 F.2d 414 (9th Cir. 1990). 10

Greenblatt v. Prescription Plan Services Corp.,
783 F.Supp. 814 (S.D.N.Y. 1992) 15

Page

Haidle v. Chippenham Hosp.,
855 F.Supp 127 (E.D. Vir., 1994) 8

Harris Trust & Savings Bank v. Provident Life and Accident Ins. Co.,
37 F.3d 608 (7th Cir. 1995) 12

Healthsouth Rehabilitation Hosp. v. Nat. Red Cross,
101 F.3d 1005 (4th Cir. 1996) 11

Howard v. Parisian,
807 F.2d 1560 (11th Cir. 1987) 12

Kayes v. Pacific Lumber Company,
51 F.3d 1449 (9th Cir. 1995). 14

Kerns v. Benefit Trust Life Ins. Co.,
992 F.2d 214 (8th Cir. 1993). 10

Klosterman v. Western Gen. Management,
32 F.3d 1119 (7th Cir. 1994). 9

Kyle Railways v. Pacific Administration Services, Inc.,
990 F.2d 513 (9th Cir. 1993). 3

Libbey-Owens-Ford Co. v. Blue Cross and Blue Shield Mutual of Ohio,
982 F.2d 1031 (8th Cir. 1993) 8

LoPresti v. Terwillinger,
126 F.3d 34 (9th Cir. 1997) 7, 18

Page

Nieto v. Ecker,
845 F.2d 868 (9th Cir. 1988). 13, 15, 17

O'Toole v. Arlington Trust Co.,
681 F.2d 94 (1982). 14

Pohl v. Kellner,
956 F.2d 126 (7th Cir. 1992). 9

Rose v. Long Island Railroad Pension Plan,
828 F.2d 910 (2nd Cir. 1987),
cert denied, 485 U.S. 936,
108 S.Ct. 1112, 99 L.Ed.2d 273 (1988) 11

Santana v. Deluxe Corp.,
920 F.Supp. 249 (D. Mass. 1996) 7

The Sixty-Five Security Plan v. Blue Cross and Blue Shield of New York,
583 F.Supp. 380 (S.D.N.Y. 1984) 8, 15

U.S. v. City of Spokane,
918 F.2d 84 (9th Cir. 1990) 11

Useden v. Acker,
947 F.2d 1563 (11th Cir. 1991) 14

Walker v. National City Bank of Minneapolis,
18 F.3d 630 (8th Cir. 1994) 6, 7

Yeseta v. Baima,
837 F.2d 380 (9th Cir. 1988). 13, 15, 18

Page

Statutes and Regulations

29 U.S.C. § 1002(21)(A) 5, 15-17
29 U.S.C. § 1112 . . . . . .16, 17

29 C.F.R. § 2509.75-8 . . . . . 6-8, 11, 12
29 C.F.R. § 2560.503-1. 1
29 C.F.R. § 2580.412-6(b)(1) and (2). 17

Other Authorities

1974 U.S. Code Cong. and Adm. News,
page 4649 18

Rules

United States Supreme Court Rule 10. 4

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Respondent does not disagree with Petitioner's statement concerning the opinions below.

JURISDICTION

Respondent does not disagree with the statement of jurisdiction set forth in the Petition.

STATUTES AND REGULATIONS INVOLVED

Respondent disagrees with the statement of statutory and regulatory provisions at issue as set forth in the Petition to the extent that 29 C.F.R. § 2560.503-1 is stated to be pertinent. Same, by its terms, purports to dèal with claims made by participants or their beneficiaries. All admit that there was no such claim here.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

This matter was decided on a motion to dismiss by General American. General American introduced into those proceedings a limited showing on factual matters outside the complaint. IT Corporation, IT Corporation Benefit Plan, and Harry Joseph Lukowski (collectively "the Plan") did not object, and the matter was decided as

a type of summary judgment motion on the basis of the materials introduced.

The documents introduced by General American were the Plan's Complaint and First Amended Complaint in state court for breach of contract and other claims against General American, with exhibits. Same included the Administrative Services Agreement (the "Agreement") between the Plan and General American. (Appendix to Petition, pp. 25a-32a, and Appendix hereto, pp. A1-A7.) General American was, and is, defending that California state court action on the grounds that all claims are preempted by the Employee Retirement Income Security Act.

The Agreement identifies IT Corporation as "the Client" and General American as "the Service Contractor." (App. to Petition at 25a.) Appendix C to same, "Claims Processing and Payment," states that " . . . each individual administrative act, decision and interpretation by the Service Contractor (including any errors, clerical or otherwise) *shall be binding* upon the Client with respect to past performance or completed action." (Appendix hereto, p. A5 last paragraph, emphasis added.)

The Administrative Agreement also provided that the Plan was to open a bank account for General American's use in making payments as General American saw fit. (Appendix to Petition pp. 25a-26a "Section 2."). General American was given the authority to issue checks drawn on that account for the purpose of paying benefits under the plan. (*Id.*) In fact, failure of the Plan to deposit money in the "Benefit Plan Account" to cover the checks General American issued resulted in immediate termination of the Agreement. (Petitioner's Appendix at 32a, ¶ (c)(88).)

The Plan specifically disputes General American's contention of fact that benefit checks were provided to

IT Corporation for distribution to the medical care providers.

The District Court decided that such matters were in fact ministerial, replying on *Kyle Railways v. Pacific Administration Services, Inc.*, 990 F.2d 513 (9th Cir. 1993), and its limited description of the duties performed by the administrator.

In a unanimous opinion authored by Judge Kleinfeld, and joined by Judges Beezer and Hug, the Ninth Circuit reversed on the ground that the record was not sufficiently clear to warrant the conclusion that petitioner was not a fiduciary as a matter of law. 107 F.3d 1415 (9th Cir. 1997). The panel began by noting that, as petitioner apparently now concedes, the recitals in the Agreement that characterize petitioner's duties as ministerial and its status as nonfiduciary cannot control the legal determination of fiduciary status, which rests on the substance of the relationship and not merely its labels. 107 F.3d at 1418-1419. "Putting the magic words in the contract, 'purely ministerial duties,' does not avoid fiduciary responsibility, if the characterization . . . is not correct. The issue is not just how the duties are characterized, but what they are." *Id.* 1419. Under the terms of the Agreement, which was the only factual evidence before the Court, fiduciary duty could not be established as a matter of law. The Ninth Circuit remanded for development of the factual record as to what actually occurred in the provision of administrations services.[1]

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[1] The issue of indemnity was not brought before any court below, and is irrelevant at to the existence of fiduciary duty anyway. The fact of an indemnification contract does not create immunity from liability — there is no indemnification until there is a judgment of liability.

II

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Decision Below Is an Unexceptional Application of Accepted Legal Principles to a Novel Fact Situation; It Neither Conflicts With the Holding of Any Other Circuit, Nor Presents an Unusually Important Question of Federal Law

This case does not meet the criteria for the issuance of a writ of certiorari as set forth in Rule 10 of the Rules of this Court, and the Petition should be denied. The holding of the Ninth Circuit was made on a very limited factual record, under a contract with peculiar language giving a claims administrator absolute binding authority. No case cited by General American contains such peculiar language in describing a claims administrator's duties as binding, and a ruling by this Court on this issue, in the absence of similar contract language, will resolve no conflict in the decisions of the Federal Courts. In *no* decision cited by General American was the decision made on the sole fact of an agreement conferring such final, binding authority on the administrator. There was just such an express delegation of final authority here.

Nor is the issue ripe for decision by this Court, due to the as-yet unique language which may never occur again in a reported, or indeed, an unreported decision. Uniformity of law in this area — ERISA — is desired, but as of this time, there is "uniformity" due to the singular contract language at issue. For purposes of the proceedings

below, the contract language, and only the contract language, led to the decisions below.

Lastly, petitioner's concern that requiring it and others with final authority to be responsible for their decisions will increase plan costs is a strange bird indeed. To allow those with final authority to both charge substantial sums to ERISA plans *and* to be immune from responsibility for their actions is a much more expensive proposition. In this regard, all the Ninth Circuit decided was that ERISA plans, like other entities making contracts, are entitled to receive what they paid for.

B. There Is No Conflict on the Basis of Discretionary Authority

General American tries mightily to manufacture a conflict between the decision of the Ninth Circuit in this case and the opinions of other Circuits. In order to do this, General American has to create a new rule of law, however. According to General American, a fiduciary duty can exist *only* where the entity in charge of plan assets refuses to dispose of them — e.g., a claim is denied. In short, General American asks that this Court amend 29 U.S.C. § 1002(21)(A) from its current language — "exercises any authority or control respecting management or disposition of its assets" — to state as follows: "exercises authority or control solely to refuse to dispose of plan assets." Thus, according to General American's arguments, the statute means the opposite of what it says, and disposal of plan assets is always a nonfiduciary activity.

The problem with General American's argument is, that while its cases discuss fiduciary status with regard to refusal to dispose of plan assets, they rest on another

ground which operates, as the Ninth Circuit realized, solely in the Plan's favor. The question on which General American's cases rested was discretion — who had the final authority with regard to the function at issue? Where that function was claims denial, who had final authority with regard to denial was the deciding factor. Where the function was payment, who had the final authority to bind the Plan to payment decisions would obviously also be the fiduciary for *that* function. It is finality that is the question.

In the cases cited by General American, the Courts relied on, as General American purports to do as well, 29 C.F.R. § 2509.75-8. That section expressly notes the difference between one who merely *recommends* claims payment as opposed to one who had the actual *authority* to make the payments. In the subsection cited by General American, D-3, in a part ignored by it, the regulation states, as another example of nonfiduciary status: "[t]he benefit supervisor, after calculating the benefits would then inform the plan administrator of the results of his calculations, and the plan administrator would authorize the payment of benefits . . ."

Here, of course, General American was not required to "recommend" payment; if it found payment appropriate, it had the authority to make it out of plan funds segregated for it to use in just that way, and its determination that the Plan terms allowed such payment was final and binding. The final authority to authorize payment, rather than to merely recommend, is the pertinent indication of fiduciary status. Thus, General American's cases claimed to "conflict" with the Ninth Circuit's opinion in this case, in fact support that opinion most strongly.

Walker v. National City Bank of Minneapolis, 18 F.3d 630 (8th Cir. 1994) supports the decision below. There

the Court found that while the bank/trustee was a fiduciary and a named fiduciary at that, it did not act as a fiduciary with regard to the function argued. Here, in conflict with that ruling, rather than in concert with same, General American contends that the function at issue is to be ignored, that where an entity acts as a fiduciary with regard to one function, it must be the only fiduciary as to all. There is no "conflict" between *Walker* and the decision below. The only "conflict" is with *Walker* and General American's position.

Custer v. Sweeney, 89 F.3d 1156 (4th Cir. 1996) also supports the decision below. In that case, the Court found that the ability to make only "non-binding recommendations" coupled with the fact "he lacked check-writing authority" (*Id.* at 1163) to be sufficient to show non-fiduciary status.[2] Here, General American expressly had binding authority — even in the case of error in interpretation — to authorize checks to be drawn on the Plan account, the exact opposite of evidence showing lack of fiduciary status. The only "conflict" is between the *Custer* opinion and General American's current arguments.

Santana v. Deluxe Corp., 920 F.Supp. 249, 256 (D. Mass. 1996) also relied on 29 C.F.R. § 2509.75-8, and the distinction between one who merely "recommends" and one who had the actual authority to dispose of plan assets: "Making recommendations respecting plan administration is not indicative of fiduciary status." A claim denial, for which an entity other than the one urged to be a fiduciary had ultimate authority, was the issue. Here, again, General American had the ultimate

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[2] *See LoPresti v. Terwillinger*, 126 F.3d 34 (9th Cir. 1997) for a very recent case holding that he who has the authority to order the check issued is the fiduciary.

authority with regard to its final, binding decision to pay, rather than deny, a claim.

In *Haidle v. Chippenham Hosp.*, 855 F.Supp 127 (E.D. Vir., 1994), another claims denial, with final authority resting in another entity, was involved. Again, the Court relied on 29 C.F.R. § 2509.75-8 in reaching its decision, and same expressly notes the difference between a recommendation and final authority. The case does contain some language to the effect that so long as an entity is following plan terms, it can never be a fiduciary. That language, however, cannot be read literally. As admitted by General American on page 4 of its petition, fiduciaries also have to follow plan terms, and such a loophole would free all, even named fiduciaries — who purport to act as they must — according to plan terms. The problem here, too, is that General American did *not* follow plan terms, but paid benefits to a person ineligible under the Plan's express provisions.

In *Confer v. Custom Engineering Co.*, 952 F.2d 34 (3rd Cir. 1991) the entity claimed to be a fiduciary was specifically instructed on the actual claim at issue not to pay it. Thus, the Court found, under 29 C.F.R. § 2509.75-8, there was no actual authority to make payment, and no fiduciary duty. The opposite is true here.

Libbey-Owens-Ford Co. v. Blue Cross and Blue Shield Mutual of Ohio, 982 F.2d 1031 (8th Cir. 1993) also supports the Ninth Circuit's opinion in this case. There, an insurer also handled claims for a self-funded ERISA plan. The agreement expressly required that the employer/plan keep a checking account to be used by Blue Cross filled with two month's estimated payments. The Court held that the question is whether there is discretion, not whether the discretion is exercised as a claims handler/insurer. The Court specifically relied on *The Sixty-Five Security Plan v. Blue Cross and Blue*

Shield of New York, 583 F.Supp. 380 (S.D.N.Y. 1984), concerning the fiduciary status of one who has control, discretionary or not, over disposition of ERISA plan assets to find a fiduciary duty on the part of the insurer/ claims administrator. Same also supports the decision below, and conflicts only with General American's arguments.

The decision in *Klosterman v. Western Gen. Management*, 32 F.3d 1119 (7th Cir. 1994) also supports, rather than conflicts, with the decision below. The Court held that making "recommendations" — rather than actual decisions — could not show fiduciary status: "The activities of Western General and Fallon in setting up Prairie Maize with Guarantee Mutual or in presenting insurance quotes and making recommendations at the time of renewal are insufficient as a matter of law to render Western General a fiduciary under the plan." (*Id.* at 1123.) Here, General American did not "recommend" payment to another who had the actual authority to decide to make payment — General American made the decision, and paid the $600,000, and its interpretation in doing so was binding, even though in error, under the express terms of the Agreement. There were no such provisions in the agreement between the parties in *Klosterman*. Again, the question is whether the entity has final binding authority with regard to the function at issue that determines fiduciary status. *Klosterman* expressly contrasted a situation where the employer had no authority to review "processed" claims — which was exactly the situation before the Court below.

In *Pohl v. Kellner*, 956 F.2d 126 (7th Cir. 1992), no assets were dissipated; a denied claim involved was denied. The Court there was not faced with, did not consider, and therefore did not decide whether authority or control over plan assets shows fiduciary status. It

decided, without elucidation of the basis, that the administrator performed ministerial functions.

In *Gibson v. The Prudential Ins. Co.*, 915 F.2d 414 (9th Cir.1990), the matter involved was a denied claim. The case made clear that with regard to a denied claim, TRW, not Prudential, was the fiduciary where denied benefits were involved. (*Id.* at 416: "Gibson subsequently appealed to the TRW Administrative Committee and was again denied benefits.") "Fiduciary status is not an all or nothing concept . . . [A] court must ask whether a person is a fiduciary with regard to the particular activity in question." [citation omitted.] A finding that TRW was not a fiduciary with respect to *denied* claims does not conflict with the Ninth Circuit's opinion below. The function here was not claims denial or review — it was payment, and the agreement gave General American the final authority on that, which General American used to dispose of over $600,000 in plan assets.

Kerns v. Benefit Trust Life Ins. Co., 992 F.2d 214 (8th Cir. 1993), held that with respect to the issue involved, failure to reinstate a policy the employer did not pay for, the insurer was not a fiduciary. There is no actual conflict, as the Court expressly refused to decide if claims administration was a fiduciary function, that issue not being before it. "Even if Benefit Trust was an ERISA fiduciary with respect to claims handling, we agree with the district court that it was not a fiduciary with respect to the functions at issue in this case — participant and beneficiary notification, premium payment, and policy lapse and reinstatement." (*Id.* at 217).

Nor is there any true conflict with the opinion in *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288 (4th Cir. 1990). That case also involved a claim denied by an insurer acting as administrator, where another was the final authority on denied claims. Here,

the function is claims payment, for which General American's decision to pay was final. Even its interpretation as to what was a "disputed" claim was expressly final, binding on the plan, even if in error.

General American contends that *Blatt v. Marshall and Lassman*, 812 F.2d 810 (2nd Cir. 1987) conflicts with the Ninth Circuit's opinion below. Not so. The court specifically found that "[w]e conclude that Marshall and Lassman acted as fiduciaries in this case because they exercised actual control over the disposition of plan assets. The definition of fiduciary under ERISA focuses on the exercise, as well as the possession, of authority or control. Thus, a person is a fiduciary with respect to a plan to the extent (i) he exercises . . . any authority or control respecting . . . disposition of its assets." (*Id.* at 812.)

Healthsouth Rehabilitation Hosp. v. Nat. Red Cross,[3] 101 F.3d 1005 (4th Cir. 1996) also firmly supports the Ninth Circuit's opinion below. There, the Court specifically cited 29 C.F.R. § 2509.75-8 as controlling. That is the regulation which, as noted above, specifically states that those who "recommend" payments are not fiduciaries, in contrast with those — like General American — who have actual authority to authorize payments. The Court in *Geller v. County Line Auto Sales, Inc.*, 86 F.2d 18 (2nd Cir. 1996) also relied on that C.F.R. section, finding that one who had no authority to authorize payment could not be held a fiduciary because they lied to get benefits.

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[3] There is no explanation why the Red Cross plan, a governmental plan not subject to ERISA, was urged to be governed by ERISA. *See U.S. v. City of Spokane*, 918 F.2d 84 (9th Cir. 1990) and *Rose v. Long Island Railroad Pension Plan*, 828 F.2d 910 (2nd Cir. 1987), *cert denied*, 485 U.S. 936, 108 S.Ct. 1112, 99 L.Ed.2d 273 (1988).

In *Howard v. Parisian*, 807 F.2d 1560 (11th Cir. 1987), the Court offered no opinion on fiduciary status, as the claimant had expressly admitted lack of same. An opinion which offers no holding on the subject at issue cannot be found to "conflict" with anything. The same was true in *Baxter v. C.A. Muer Corp.*, 941 F.2d 451 (6th Cir. 1991), which also noted that 29 C.F.R. § 2509.75-8 provided the basic authority on this subject. 29 C.F.R. § 2509.75-8, as noted, requires a finding that General American is a fiduciary because it had actual authority to issue checks, not merely the ability to "recommend" they be issued.

In *Harris Trust & Savings Bank v. Provident Life and Accident Ins. Co.*, 37 F.3d 608 (7th Cir. 1995), the agreement stated that the insurer/administrator had "final" authority on such matters as "payment for charges." (*Id.* at 613.) The actual facts upon a fully developed record, however, showed that the agreement was not followed. The Court noted that since the actual facts showed the employer, not the administrator, had actually made the decision, no fiduciary status for that decision — that function — could be found in that case. Here, the only evidence placed before the district court, and the Ninth circuit, was the agreement. And the Ninth Circuit remanded to allow just the factual development to contradict that agreement. There is no "conflict." Both decisions hold that the entity which exercises the final authority with regard to the function at issue is the fiduciary.

Broemenn Healthcare v. Northwestern Nat'l. Life Ins. Co., 806 F.Supp 799 (C.D. Ill. 1992) also supports the decision below. "Whether Bromenn falls within this definition necessarily depends upon the possession of discretionary control or actual authority." (*Id.* at 804.)

"Contributions made to a plan by such employer or employee organization become 'funds' of the plan if and when segregated . . . Northeastern, as the excess risk insurer, controls only its own assets, not the assets constituting Plan funds . . . If the Subscription Agreement provided that Northwestern paid the actual benefits as opposed to reimbursing the Plan for benefits actually paid, this finding [that Northwestern was not a fiduciary] might be different." (*Id.* at 805.) Here, the "funds" *were* segregated — into a bank account General American had the final authority to dispose of — and did to the tune of $600,000 paid to a nonparticipant, nonbeneficiary.

American General cites *Chapman v. Klemick*, 3 F.3d 1508 (11th Cir. 1993) for the proposition that it cannot be a plan fiduciary with regard to its disposition of existing plan assets. In that case, the plaintiffs claimed that a personal injury attorney who had collected attorneys fees upon settlement of an ERISA plan beneficiary's personal injury action was a plan fiduciary. The plaintiffs, having obtained a full, but uncollectible, judgment for the beneficiary for plan assets paid to him for treatment of his injuries, wanted his attorney to give them his attorneys fees, under the theory that they were "plan assets" by virtue of a subrogation provision. The *Chapman* court relied on the Ninth Circuit's opinion in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), which in turn relied on *Yeseta v. Baima*, 837 F.2d 380 (9th Cir. 1988). It found that the ties the beneficiary's attorney had to the plan were even more tenuous than found in *Nieto*, because the attorney rendered *no* services to the plan.

General American states that *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288 (4th Cir. 1990) conflicts with the opinion of the Ninth Circuit below.

That case involved a denied claim. The Court based its holding specifically on the fact that the administrator did not have final decision-making authority over the function involved — claims denial. Here, General American did have such final authority over the claim at issue, a paid claim. The Court did not decide the issue at hand, whether final authority to pay a claim from plan assets, when such authority was made binding on the Plan whether in error or not, shows a fiduciary duty in the function at issue.

In *Eaton v. Aetna Cas. & Surety Co.*, 581 F.Supp 743 (D.D.C. 1980), the third-party administrator "adjudicated varied and substantial medical claims for reimbursement in which its judgment as to what charges or amounts were fair, reasonable, and customary was in effect final." (*Id.* at 746-747). There, the Court expressly found that the fact a third party administrator's decision to pay a claim was final to be a strong indicator of fiduciary authority, despite the fact the administrator argued, as General American does here, that its final authority with respect to paying claims was ministerial because done within a tight framework of rules, interpretations, policies, and practices established by the plan trustees that sued it. *Eaton* was relied on by the Ninth Circuit in *Kayes v. Pacific Lumber Company*, 51 F.3d 1449, 1460 (9th Cir. 1995).

The Ninth Circuit in the opinion below expressly noted that a bank acting as a depository was not a fiduciary — thus rendering inaccurate General American's claims of a conflict with *O'Toole v. Arlington Trust Co.*, 681 F.2d 94 (1982); *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991) (same in fact

specifically relied on the Ninth Circuit opinion in *Yeseta v. Baima*, 837 F.2d 380 (9th Cir. 1988)[4] — see page 1578).

The opinion of the Ninth Circuit below joins a long line of cases holding that it is final authority that determines whether a function in question is a fiduciary function imposing a fiduciary duty. The attempt by General American to create a "conflict" with cases holding the same, but dealing with different functions than the function here, has no support. To find that only one who refuses to dispose of plan assets had a fiduciary duty would be in direct conflict with the dictates of 29 U.S.C. § 1002(21)(A), and in direct conflict with common sense and Congressional intent to ensure protection of ERISA plan assets from wrongful waste.

C. The "Bright Line" Test Offered by General American Is a Murky Morass

General American also argues that the "tests" it puts forth are "bright line" tests which will lead to uniform, predictable results. General American admits, as it must, that it had discretion, but argues that it was not "enough" discretion, and urges that the Court overturn the Ninth Circuit's opinion below and insist that each Court determine on a case by case basis just how much "discretion" is necessary to find a fiduciary duty. In short, General American argues that not only should 29

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[4] *Yeseta v. Baima*, 837 F.2d 380 (9th Cir. 1988) has been embraced by many other Courts.. *See Greenblatt v. Prescription Plan Services Corp.*, 783 F.Supp. 814 (S.D.N.Y. 1992); *The Sixty-Five Security Plan v. Blue Cross and Blue Shield of New York*, 583 F.Supp. 380 (S.D.N.Y. 1984); *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988);

U.S.C. § 1002(21)(A) be read to bar fiduciary status to those who dispose of, rather than preserve, plan assets, it must also be read to bar fiduciary status to those who admittedly have discretion to the point of final authority over plan administration. Under General American's "test," each case would be decided on a subjective standard having nothing to do with either the statute, or the intent of Congress in enacting it. There could be no uniformity.

The correct, and truly "bright line," test is that which the Courts have already uniformly set forth — is the authority final and binding with regard to the function performed? If it is, then fiduciary status is found. General American's test is one in conflict with every decision General American cites, is unworkable, and would lead to flights of whimsy rather than a standard which is knowable and followable.

D. The Distinction Between "Control/ Authority" And "Handling" Is of No Aid to General American

To be sure, the Ninth Circuit did not expressly address the relevance of the bonding language, but that is undoubtedly because it was not advanced in petitioner's brief on appeal. Rather section 1112 was first cited in the petition for rehearing. Indeed, the petition does not point to a single other case from other courts of appeals that relies on the bonding argument in order to deny fiduciary status based on the improper — but final and binding — decision to pay claims. Even assuming that the argument has been preserved for review in this Court, this Court should wait to see whether the lower courts find this ground for fiduciary status troubling, and

grant review after the legal issue has been more fully developed.

In that petition for rehearing, as here, General American argued that 29 U.S.C. § 1112 in effect renders the language of 29 U.S.C. § 1102(21) (A) meaningless, and urges the over-ruling of a decade of law followed throughout all circuits confronting the function at issue — disposal of plan assets.

Judge Kleinfield's opinion below already pointed out the solution to this nonexistent quandary, noting the difference between a mere "depository" and one who has authority or control over that money. Another example would be truly ministerial acts, such as the persons within General American who put the checks into envelopes and mail them at the direction of General American.

The example offered by General American below, and the Court in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), of a janitor, would in fact have to be bonded, if he had keys to the place where the checks were kept. While such persons "handle" funds within the meaning of the statute, they do not control them and have no authority to issue the checks themselves.

This is also true of General American's new example of individual claims adjusters, in contrast to General American itself, or the very example offered by the regulation cited by General American — a "benefits supervisor" who can make recommendations only, but has no authority to make actual payment. The regulations applicable to bonding specifically state that such persons must be bonded, so long as there is a risk of loss of the funds. See 29 C.F.R. § 2580.412-6(b)(1) and (2). All who have access to the checks are to be bonded. Those who have control and/or authority over to whom the checks are made payable are fiduciaries. General

American did not merely handle checks previously authorized by The Plan — General American itself authorized the checks, and the disposal of plan funds.

Control of plan assets is in and of itself sufficient to find fiduciary duty. In *Blatt v. Marshall and Lassman*, 812 F.2d 810 (2nd Cir. 1987), the court specifically found that "appellees had no discretionary role in administering the plan" and "were found not to possess any discretionary authority with respect to management of the plan or disposition of its assets." (*Id.* at 812.) However, "[w]e conclude that Marshall and Lassman acted as fiduciaries in this case because they exercised actual control over the disposition of plan assets. The definition of fiduciary under ERISA focuses on the exercise, as well as the possession, of authority or control. Thus, "a person is a fiduciary with respect to a plan to the extent (i) he exercises . . . any authority or control respecting . . . disposition of its assets." (*Id.* at 812.) *See also LoPresti v. Terwillinger*, 126 F.3d 34 (9th Cir. 1997) for a very recent case holding that he who has the authority to sign the check is the fiduciary, and *Yeseta v. Baima*, 837 F.2d 380 (9th Cir. 1988), another widely cited case coming from the Ninth Circuit.

The Ninth Circuit's opinion, as well as being consistent with cases within and without that circuit concerning the ability to dispose of plan assets, is also consistent with Congress' intent in imposing stricter standards where plan assets were concerned: "As defined by the Act, a fiduciary is a person who exercises any control, management, or disposition with respect to monies or other property of an employee benefit plan, or who has authority or responsibility to do so." 1974 U.S. Code Cong. and Adm. News, page 4649. Further, "it is expected that the courts will interpret . . . fiduciary standards bearing in mind the special nature and purposes of

employee benefit plans intended to be effectuated by the Act." (*Id.* at 4650.)

E. The Impact of Immunity For Those Paid as Expert Administrators Defies The Concept of "Expert" And of The Premise of ERISA

As noted above, General American also contends in state court that ERISA preempts any breach of contract action against it, that there is no remedy under either federal or state law for its wrongful dispostion of $600,000 in plan assets. Thus, the administration contract is basically a gift of ERISA plan funds to an administrator, who had no enforceable duty or liability to the Plan.[5] The 91% of ERISA plans[6] using such "expert" administrators are argued to be expending funds on entities free to dispose of assets with impunity and immunity. The decision General American requests of this Court would cause great losses to ERISA plans, because these administrators would know that shoddy,

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[5] General American's contention that an "equitable" action "might" be available to allow recovery by the Plan is, under the cases it cites, incorrect, as the funds were not given to a partner of General American's, but a completely outside party.

[6] The claim that such immunity from both contract law and ERISA fiduciary status would help preserve the privacy of employees is 1) insufficient to allow same and 2) incorrect — unless this Court would also find that no employer or plan is allowed to even audit the conduct of third-party administrators. Thus, Plans would not only be forced to make a gift of plan funds to immune administrators, the Plans could not even figure out if such gifts were being given to those who showed their appreciation by giving back decent administration.

substandard, even fraudulent administration was without liability, without even bare contractual responsibility.

General American argues that third-party administrators should be able to count on immunity for wrongful disposition of plan assets to foster the least expensive administrative costs for ERISA plans. Less expensive administration is a very high price indeed for loss of substantial plan assets, such as the $600,000 General American admits it wrongfully disposed of in this matter. As noted by General American, the insurance and claims administration industry performs many ERISA plan functions, precisely because they advertise their expertise in this area. One who obtains administration fees from plan assets on the basis of expert status should not be found to argue, as is done here, that waste of plan assets shall go unremedied because of *in*expert conduct. Having voluntarily chosen to reap the financial rewards of controlling plan assets, an insurer who does so has also voluntarily chosen to take the responsibility of providing the services promised in a fashion that preserves those assets for participants and their beneficiaries, rather than harms those protected by ERISA by diverting the assets of their plans to ineligible persons. Avoidance of wrongful depletion of plan assets is the purpose behind imposition of fiduciary status under ERISA. Waste of same to obtain inexpensive administration is not.

CONCLUSION

The Ninth Circuit did not err in following its own precedent and that of all other circuits in finding that an entity with final binding authority over disposition of plan assets is a fiduciary, especially where that authority admittedly involved the exercise of discretion. The radical new standard urged by Petitioner, across-the-board immunity for those who are paid by ERISA plans for expert administration, is one unsupported by any law or by basic common sense.

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Respectfully submitted,

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